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IN THE

Supreme Court of the United States

October Term, 1944 — No. 1121

In the Matter

of

CHILDS COMPANY, DEBTOR.

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act — No. 82,868

JOHN F. X. FINN, as Trustee of CHILDS COMPANY,
Petitioner,

against

THE 415 FIFTH AVENUE COMPANY, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT and BRIEF IN SUPPORT OF PETITION

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals For the Second Circuit

Your petitioner, John F. X. Finn, as Trustee of Childs Company, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court entered in the above entitled proceeding on January 16, 1945. The decree affirmed an Order of the United States District Court, dated September 27, 1944, which granted a petition of the respondent and adjudged that all rights of petitioner and of Childs Company under a lease dated May 19, 1931, covering the

premises at 1551 Broadway, New York City, had terminated and come to an end by virtue of the exercise by the landlord of an option to terminate said lease under the provisions of a "bankruptcy clause" therein (R. 288-292).

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 146 Fed. 2d, 592. The opinion of the United States District Court for the Southern District of New York (R. 288-92) has not been reported.

I

Summary and Short Statement of the Matter Involved

Childs Company, the Debtor, is engaged in the business of operating a chain of restaurants. On May 19, 1931 it entered into a sixteen-year lease covering the premises 1551 Broadway, New York City (Ex. 2; R. 6, 7, 237). The Debtor conducted a restaurant upon the ground floor of that property and sublet the upper floors. It has a heavy investment in improvements and equipment in the leasehold (R. 21). The lease contains a provision granting the lessor an option to forfeit the lease in the event, *inter alia*, that a "Trustee be appointed for the lessee's property" (R. 237-8).

On August 26, 1943, the Debtor filed a voluntary petition for its reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Southern District of New York, and on that day John F. X. Finn was appointed trustee of the Debtor by Order of the said Court (R. 273).

On June 23, 1944, approximately ten months after the filing of the petition for reorganization of the Debtor, the landlord served upon the Debtor a notice of the exercise of its option under the above provision to terminate the lease (R. 235).

Thereafter, by petition verified July 5, 1944, The 415 Fifth Avenue Company, Inc., the respondent landlord, filed a petition in the United States District Court, Southern District of New York, praying for an order adjudging that the lease of the Debtor had been terminated and directing the trustee of the Debtor to surrender possession of the premises to the landlord. The ground of the application was the filing of a petition for reorganization, as above set forth, and the appointment of the petitioner as trustee of the Debtor, which the landlord claimed was in violation of the forfeiture provision of the lease (R. 6-8).

The petition of the landlord was referred by Judge Edward A. Conger, in charge of the reorganization proceeding, to Hon. Robert P. Stephenson, as Special Master, to hear and report to the Court (R. 37-38). The Special Master recommended that the relief requested in the petition be granted (R. 272-5). The District Court adopted the Special Master's findings of fact and conclusions of law and granted the relief prayed for in the petition (R. 293-5). The Circuit Court of Appeals affirmed the order of the District Court.

Between December 6, 1943 and February 7, 1944 negotiations were conducted between the attorneys for the trustee and the attorneys for the lessor (R. 273). On January 28, 1944, at a meeting between the attorneys for the respective parties, the trustee was requested by the landlord's attorneys to assume the lease on its then terms (Ex. M, R. 265). In response thereto, the petitioner's attorneys made a proposal for a modification of the lease so as to provide a lower base rental plus a percentage of sales more favorable to the landlord than the existing lease (R. 279-80). In answer thereto, the attorneys for the landlord represented, as found by the Special Master, that:

> "The desirability of a lease providing for a rental which depended upon earnings would depend, to a large extent, upon the management of the Childs Com-

pany, and this could not be known until it was known who was going to manage the Childs Company upon reorganization, and that in any event there was no need to hurry and that it would be preferable to wait until the reorganization proceeding was further along, and that he would subsequently communicate with Mr. Lorenz (petitioner's attorney) regarding this matter" (R. 274, 275).

These representations as to the lessor's intent were fraudulent. They were relied upon by petitioner, and his position was changed to his detriment as a result thereof (R. 121).

The Circuit Court of Appeals took the position that this misrepresentation was immaterial because there was not also a "representation that the lessor would not exercise its power of termination if it should later reject the trustee's offer."

The facts as found by the Special Master were confirmed by the District Court, and are not in dispute. Petitioner contends, however, that the legal conclusions of the Court, from the established facts, are erroneous.

II

Reasons Relied Upon For the Granting of the Writ of Certiorari

1. The decision of the Circuit Court of Appeals in holding that the landlord's misrepresentations of its intentions did not constitute the basis of an estoppel is contrary to the controlling law of the State of New York, and thus contravenes the doctrine of *Erie* v. *Tompkins,* 304 U. S. 64.

2. The decision of the Circuit Court of Appeals that in a Reorganization Proceeding, a delay of ten months by

a landlord in exercising an option to forfeit a lease by virtue of the institution of reorganization proceedings, does not constitute a waiver of such right, is erroneous as a matter of law. Such a rule would seriously impede the administration of corporate reorganizations under Chapter X of the Bankruptcy Act, and is contrary to well established principles laid down by the Supreme Court. This question involves an important principle affecting corporate reorganization and should be determined by this Court.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Second Circuit be reversed; and that petitioner be granted such other and further relief as may be just and proper.

Dated: New York, April 5, 1945.

JOSEPH LORENZ
Counsel for Petitioner

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OF

CHILDS COMPANY, DEBTOR

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JOHN F. X. FINN, as Trustee of CHILDS COMPANY,
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THE 415 FIFTH AVENUE COMPANY, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinions below and the statement of the case are believed sufficiently set forth in the foregoing petition and in the argument herein.

II. Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925 (28 U. S. C. Sec. 347) and Section 24 (c) of the Bankruptcy Act.

III. Specification of Errors

The Petitioner will urge that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that a landlord's misrepresentations of its intentions made during the course of negotiations with the Trustee were immaterial and did not constitute the basis of an estoppel.

2. In failing to follow the controlling law of the State of New York as to the effect of such misrepresentations, in violation of the rule of *Erie* v. *Tompkins*, 304 U. S. 64.

3. In holding that in a Reorganization Proceeding, a delay of ten months, under the admitted facts in this case, by a landlord in exercising an option to forfeit a lease of the Debtor by virtue of the institution of Reorganization Proceedings, did not operate as a matter of law as a waiver of said option.

4. In failing to reverse the order of the District Court decreeing that the lease between the parties was terminated and directing the Petitioner and the Debtor to vacate the premises in question.

IV. Summary of Argument

The points of argument will follow the reasons relied upon for the Writ of Certiorari, and will be discussed in the order stated in the petition.

V. Argument

POINT I

The decision of the Circuit Court of Appeals, in holding that the landlord's misrepresentations of its intentions did not constitute the basis of an estoppel, is contrary to the controlling law of the State of New York, and thus contravenes the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64.

There is no dispute as to the representations made by the lessor's attorneys. As heretofore shown, they have been expressly found by the Special Master (Finding 15; R. 274, 275). For convenience, the finding is here set forth:

> "In telephone conversations between Herbert Birrell and Joseph Lorenz on January 31, February 2, and February 7, Herbert Birrell in substance stated that the desirability of a lease providing for a rental which depended upon earnings would depend, to a large extent, upon the management of the Childs Company, and that this could not be known until it was known who was going to manage the Childs Company upon reorganization, and that in any event there was no need to hurry, and that it would be preferable to wait until the reorganization proceeding was further along, and that he would subsequently communicate with Mr. Lorenz regarding this matter."

Nor is there any doubt that these statements were false and were made with the sole purpose of lulling the trustee into security and inaction while the landlord was completing his negotiations with other parties with whom a new lease was ultimately made. Thus, as the Special Master found:

> "Beginning in January, 1944, and continuing until a lease was executed between the petitioner (the landlord) and a new tenant, the petitioner had offers and was considering offers from this new tenant and others" (Finding 11; R. 274).

There is no dispute that the landlord never had the slightest intention of himself considering the trustee's offer. In fact, the landlord's attorney, in an affidavit submitted in support of the proceeding to terminate the lease, not only denied that he or the landlord ever had any intention of considering said offer, but went so far as to deny that he ever made the representations (R. 30, 31). For example, in said affidavit the landlord's attorney stated:

> "My purpose in outlining these points was to show Mr. Lorenz that even to a person who was in favor of percentage leases, the one which he proposed was without merit so that I would not even recommend it to our clients and secondly that our clients had definitely indicated their position. * * * There was no statement on my part that I would discuss this situation with our client * * *" (R. 30, 31).

As we have seen, the Master in his finding above quoted rejected these statements of the landlord's attorney, but they indicate conclusively that neither the landlord nor his attorneys ever had any intention of accepting or considering in good faith the trustee's proposal.

There can be no doubt that the deception practiced upon the trustee resulted in serious injury to the Debtor's estate. The period was a critical one. Realty values in the vicinity were rising constantly and substantially (R. 273; finding 9). The trustee was presented with several alternatives. He could have assumed the lease, as modified, on January 28, 1944, as he was being pressed to do, if no better proposition were available. This he would

have done (R. 275, finding 16) if he had not been misled by the misrepresentations. Or the trustee might have obtained other premises in the vicinity. Believing that the landlord was in good faith considering the trustee's proposal, he naturally made no efforts to that end. The deception practiced by the landlord in view of the drastic increase in rental values during this period, fundamentally changed and injured the trustee's position.

Despite these facts the Circuit Court of Appeals was of the opinion that the misrepresentations were immaterial, and did not constitute the basis of an estoppel. Thus the Court said:

> "The maximum inference to be drawn from the remarks of the lessor's attorneys is that the lessor was in no hurry to come to a decision; and even if it was a misrepresentation, as the appellant contends, *because the lessor's attorneys had already decided that a rental based on earnings would be unacceptable, we do not see that that is relevant. There was no representation that the lessor would not exercise its power of termination if it should later reject the trustee's offer.*" (Italics ours.)

The Court was apparently of the opinion that such a misrepresentation was not "relevant," since the lessor did not represent that it would not exercise its power of termination if it should later reject the trustee's offer. Rephrased, the Circuit Court of Appeals felt that the fraudulent misrepresentations were immaterial since the lessor could later reject the trustee's offer and exercise its power of termination.

This conclusion of the Circuit Court of Appeals is directly contrary to decisions of the Court of Appeals of the State of New York upon this question. In ignoring the governing New York law the Court violated the rule laid down in *Erie* v. *Tompkins*, 304 U. S. 64. Petitioner does not contend that if the landlord's representations and statements had

been made honestly and in good faith that it could not have changed its mind thereafter. But as has been demonstrated, the representations were false and were not made in good faith.

The precise issue was presented and decided in *Adams* v. *Gillig*, 199 N. Y. 314. In that case, the defendant falsely misrepresented to the plaintiff that he desired to purchase a portion of a vacant lot for the purpose of building dwellings thereon. The plaintiff relied upon the defendant's honesty and good faith, and sold a portion of her property to the defendant. Defendant did not intend to carry out his representation to the plaintiff, and the plaintiff sued to cancel the deed, because of fraud. The following language of the Court (p. 321) is peculiarly pertinent:

> "The intent of Gillig was a material existing fact in this case, and the plaintiff's reliance upon such fact induced her to enter into a contract that she would not otherwise have entered into. *The effect of such false statement by the defendant of his intention cannot be cast aside as immaterial simply because it was possible for him in good faith to have changed his mind or to have sold the property to another who might have a different purpose relating thereto. As the defendant's intention was subject to change in good faith at any time it was of uncertain value. It was, however, of some value. It was of sufficient value so that the plaintiff was willing to stand upon it and make the conveyance in reliance upon it.*
>
> • • • • •
>
> "It is said that this decision will open the door to litigation. If that is the effect of it, then, so far as the decision asserts power in the court to prevent dishonesty, false dealing and bad faith in business transactions, it should be welcomed.
>
> • • • • •

> "We do not concede the accuracy of the statement made before us on behalf of the defendant to the effect that false statements similar to the one made by the defendant to induce the execution of the deed by the plaintiff are common in business transactions, but if true, and controversies arise over the retention of the fruits of such frauds, and the fraudulent inducement is conceded or proven beyond reasonable controversy, the transaction will not have the approval and sanction of the courts." (Italics ours.)

The error of the Circuit Court of Appeals in failing to apply the New York law as above set forth went to the heart of petitioner's estoppel argument. It was the fraudulent misrepresentations of the lessor as to its intent which were relied upon by petitioner to his detriment and which furnished the legal ground for estopping the lessor from exercising its right of termination.

Not only is the decision of the Court below contrary to the controlling New York law and thus in violation of the rule of *Erie* v. *Tompkins, supra,* but, it is submitted, it is opposed by the weight of Federal authority.

See: Seven Cases *v.* U. S., 239 U. S. 510;
Rogers v. *Virginia-Carolina Chemical Co.,* 149 Fed. 1, 13, 14;
Keeler v. *Fred T. Ley & Co.,* 49 F. (2d) 872;
Arnold v. *National Aniline & Chemical Co.,* 20 F. (2d) 364, 369 (2nd Cir.).

The rule of *Erie* v. *Tompkins, supra,* made it mandatory upon the Circuit Court of Appeals to apply the law of the State of New York as to the effect of the false representations regarding the lessor's intent. Its failure to do so constitutes fundamental error.

POINT II

The decision of the Circuit Court of Appeals that in a reorganization proceeding a delay of ten months by a landlord in exercising an option to forfeit a lease by virtue of the institution of reorganization proceedings, does not constitute a waiver of such right, is erroneous as a matter of law. Such a rule would seriously impede the administration of corporate reorganizations under Chapter X of the Bankruptcy Act, and is contrary to well established principles laid down by the Supreme Court. This question involves an important principle affecting corporate reorganizations and should be determined by this Court.

The debtor filed a petition on August 26, 1943 for reorganization under Chapter X of the Bankruptcy Act. The District Court approved the petition, and appointed the petitioner, trustee in reorganization of the debtor (R. 275). Various negotiations were had between the parties, as set forth in Point I hereof. Thereafter, on June 23, 1944, approximately ten months after the trustee was appointed, petitioner received from the lessor a notice of election to terminate the lease (R. 235).

It is the contention of petitioner that, as a matter of law, in a reorganization proceeding under Chapter X, the failure of the lessor, under the circumstances here disclosed, to exercise its option to terminate a lease owned by the debtor until ten months have elapsed from the accrual of such right resulted in a waiver thereof. It is undisputed in the present case that during the period in question there was a substantial fluctuation in the rental values of real estate in the vicinity. Thus, the Special Master found that:

> "Between December, 1943 and June 23, 1944 there was a constant and substantial rise in the rental value

of real estate in the vicinity of the property covered by this lease." (Finding 9, R. 273.)

As this Court stated in an analogous situation in *Grymes* v. *Sanders* (1876) 93 U. S. 55, at page 62:

> "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, *at once announce his purpose*, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. *Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value.*" (Italics ours.)

The policy announced by the Supreme Court in the *Grymes* case, involving mistake or fraud, is much more pronounced where the party asserting the right seeks to effect a forfeiture, which courts of equity abhor.

Compare,

> *Gazlay* v. *Williams, Trustee, etc.*, 210 U. S. 41;
> *Francis* v. *Ferguson*, 246 N. Y. 516.

In the "*Elevator Case*", 17 Fed. 200, a lessor claimed a forfeiture of a lease by virtue of a sub-letting of the premises without the consent of the lessor. The court held that the failure of the lessor to take prompt advantage of the breach caused by the sublease, which was alleged to be for a period of "two or three months" constituted waiver of any of the landlord's rights of forfeiture. The court stated in part (p. 202):

> "It is reasonable, it is natural, that when a contract puts into the power of one man to say that under

certain contingencies, of which he is to be the judge, he shall enter upon the house or home or property of another, and eject him instantly, and take possession, —it is reasonable, it is proper, that the contract and the acts which justify such a course of conduct shall be construed rigidly against the exercise of the right. Courts of equity, when necessary, when this power has been exercised, will come in and afford relief.

* * * * *

"It is sufficient to say, as to this, that if it was provided by the lease that this elevator should be kept in the hands of the original parties, (as it probably was,) it seems to us that the time which elapsed before the railroad company undertook to enforce their rights under that breach of the terms of the lease is enough to condone or waive it."

In *Commercial Trust Co.* v. *Wertheim Coal Co.*, 88 N. J. Eq. 143, where a forfeiture of the lease was invoked for various breaches thereof including a failure to pay taxes, the lessor, with knowledge of the breaches, took no action to enforce the forfeiture provisions for approximately eight months. The Court held, at page 151:

"This delay is, in effect, a waiver of the default in equity where forfeitures are not regarded with favor. Grigg *v.* Landis, 21 N. J. Eq. 494. Some definite action must be taken to claim a forfeiture, and it is well settled that if such action is taken after a lapse of time this constitutes a waiver of the right to declare a forfeiture. 24 Cyc. 1364. It has been held that the lessor may waive the forfeiture by neglecting to assert his right within a reasonable time after the default. 24 Cyc. 1364."

Powers Shoe Co. v. *Odd Fellows Hall*, 133 Mo. App. 229, 113 S. W. 253 (1908), closely parallels the case at bar.

The ground of forfeiture in that case was the breach of a covenant in a lease prohibiting the assignment without the consent of the lessor. The assignment was dated July 14, 1906. The tenant notified the landlord of the assignment and asked the lessor to consent to the assignment on September 9th. On October 18th the lessor served notice of its election to forfeit the lease because of the aforesaid breach. The Court found that the delay of the lessor for three months was sufficient to work a waiver of the lessor's right to declare a forfeiture. The Court stated in part:

> "If a landlord would forfeit the term for breach of contract by the lessee, he must be prompt in his declaration of forfeiture after he learns of the breach, and *cannot hold his decision in reserve to speculate for some advantage to himself, while he suffers the tenant to incur expense in the belief that he will not be disturbed.* 18 Am. & Eng. Ency. Law (2d Ed.) pp. 382, 383, and citations in notes; Carnhart *v.* Finney, 40 Mo. 449, 93 Am. Dec. 303; Hawes *v.* Favor, 161 Ill. 440, 43 N. E. 1076."

Compare, *Kelly* v. *Varnes*, 52 App. Div. (N. Y.) 100;
Catlin v. *Wright*, 13 Neb. 558.

The principles we have discussed are particularly applicable in the administration of corporate reorganizations under Chapter X. It is of paramount importance in such cases that persons holding executory contracts with a debtor in reorganization should exercise promptly any claimed right of forfeiture arising out of the filing of a petition for reorganization. Chapter X of the Bankruptcy Act was enacted by Congress to provide a more satisfactory method for the reorganization of corporations which found themselves in temporary financial straits. Its purpose was to permit the business of such corporations to be continued and their assets preserved for creditors and stockholders, rather than have them partially or wholly

destroyed by proceedings in bankruptcy or equity receiverships. In innumerable instances, corporate contracts, including leases, constitute assets which, in many cases, are vital to the continuance of the business.

If the decision herein of the Circuit Court of Appeals should in such situations be followed, the administration of proceedings under the Act and the possibility in many cases of a successful reorganization, will be substantially impaired. No plan of reorganization can be promulgated in a situation where the trustee does not know whether or not valuable executory contracts of the debtor will be cancelled.

With respect to the exercise of a right of cancellation in a reorganization proceeding, time is definitely of the essence. The very nature of such a proceeding should make it mandatory that lessors exercise their rights of termination promptly or else such right should be deemed waived by delay in its exercise. Certainly the lessor should not be permitted to hold such right of termination in abeyance and exercise it at his convenience or best advantage. The trustee in such a situation cannot assume the lease, since his affirmation of the lease is subject to the right of cancellation. On the other hand, if the lessor desires a speedy determination as to whether the trustee will assume the lease, he can follow the customary practice of applying to the Court for an order requiring the trustee to assume or reject the lease within such time as may be fixed by the Court. (*cf. Green* v. *Finnegan Realty Co.*, 70 F. (2d) 465, 466, 5th Cir.)

Certainly, in any event, a lessor should not be permitted to hold off the trustee, and, by means of misrepresentations of his intentions, as discussed in Point I, lull him into security, while in a rising and speculative market, the lessor negotiates with other parties without disclosing that fact to the trustee (R. 274; Finding 12). Under these circumstances, it seems clear that the rule of the Supreme Court in *Grymes* v. *Sanders, supra,* must be applied.

Petitioner submits, therefore, that the decision of the Circuit Court of Appeals, under the circumstances above set forth, to the effect that an option of termination is not waived by failure to exercise it promptly, is unsound both from a legal and practical viewpoint, and would seriously hamper the administration of Chapter X of the Chandler Act.

This aspect of corporate reorganization law has never been passed upon by this Court, either with respect to Section 77B or its successor, Chapter X of the Bankruptcy Act. It involves a question of vital importance in the administration of corporate reorganizations.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

Dated: April 5, 1945.

JOSEPH LORENZ
Counsel for the Petitioner

No. 1121

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is officially reported in 146 Fed. (2d) 592 (R. 302). The opinion of the District Court (R. 288-292) has not been reported.

I.

Supplementary Statement of Facts.

The petition and supporting brief omit certain facts which will be briefly stated and which are considered essen-

tial to an understanding of the questions involved. The testimony in relation thereto is uncontradicted, with one exception, to which attention will be called.

The original lease provided for a net rental of $49,000 per year. To assist the Debtor in its efforts to prevent a bankruptcy or reorganization, Petitioner entered into an agreement with the Debtor on May 1, 1941, reducing the net rent to a fixed minimum of $36,000 per year, plus approximately 6% of the Debtor's yearly sales in excess of $564,280. The agreement provided it should be void if a petition for reorganization should be filed by the Debtor on or before April 30, 1944. Such petition was filed on August 26, 1943.

On December 6, 1943 there was a meeting between Lowell Birrell and Herbert Birrell, the Respondent's attorneys, and Joseph Lorenz, Petitioner's attorney, at which negotiations were commenced for the continuation of the lease. Lowell Birrell urged that Petitioner assume the lease as modified by the agreement of May 1, 1941 (R. 185, 190). This offer was rejected by Mr. Lorenz (R. 190, 191). Lowell Birrell warned him that the best the trustee could hope for was to secure the premises on the terms of the lease as so modified (R. 74) and that Respondent would canvass the market, believing that it could get a new tenant at the modified rent or better. Mr. Lorenz stated that if a new tenant were found he thought the trustee would vacate the premises and that some arrangement could be made for the sale of the Debtor's equipment and fixtures to the new tenant (R. 75).

On January 27th, 1944 Lowell M. Birrell telephoned Mr. Lorenz that Respondent's directors were about to hold a meeting and requested Petitioner's best proposition "so that we might have them together with the other propositions that we might have for the meeting"; that Respondent

had canvassed the market and found the property worth more than Respondent considered it (R. 69, 70). According to Mr. Lorenz' testimony Mr. Birrell told him that Petitioner must make an immediate decision or get out (R. 191, 192).

An appointment was made for a conference on the following day with Mr. Lorenz. Unable to attend himself, Lowell M. Birrell instructed Herbert Birrell to attend for two purposes only.

> First, to make some arrangements for payment on account of use and occupation, and second, to get Petitioner's answer to the Respondent's offer (R. 134).

At this meeting satisfactory arrangements as to use and occupation payments were made. Mr. Lorenz then advised Mr. Birrell that the only lease Petitioner would consider would be one with a small minimum rent plus an increased percentage of sales (R. 135). Thus for the second time Respondent's offer was rejected, although Mr. Lorenz had been authorized by Petitioner to accept it—an important fact which Mr. Lorenz failed to disclose to Mr. Birrell (R. 135, 198).

This meeting was followed by telephone conversations between Herbert Birrell and Mr. Lorenz on January 31, February 2, and February 7, 1944, during which, according to Mr. Lorenz' testimony, Mr. Birrell stated that the desirability of a percentage lease would depend largely upon the management of the Childs Company, which could not be known until it was known who was going to manage the company upon reorganization. Mr. Lorenz further testified that Mr. Birrell had also stated that in any event there was not need to hurry and that it would be preferable to wait until the reorganization proceeding was further along (R.

120, 121), this testimony being emphatically contradicted by Mr. Birrell (R. 139, 141), who testified that he had not said there was no need to hurry or that the matter could await further reorganization developments but that he had told Mr. Lorenz the percentage proposal was a poor one for the very reason that the kind of management would not be known until the Debtor emerged from reorganization (R. 135).

The Master found as a fact (Finding 15, R. 274, 275) that Mr. Birrell had made substantially the statement attributed to him.

Mr. Lorenz testified that this statement lulled him into a feeling of security (R. 196-198) with the result that he took no further action toward assuming the lease while waiting for a response to his proposition for a percentage lease. In this connection the Master found (Finding 13, R. 274):

> "13 The trustee and his attorney believed that between January 28, 1944 and March 22, 1944, the petitioner would be willing to consider a proposition for a lease to be agreed upon, and also believed that the petitioner was not communicating with the trustee or his attorney until the reorganization proceeding should be further advanced, but such belief was not induced by any representation made or implied by the petitioner, or by the petitioner's attorney."

The Master, in his opinion, also stated:

> "I find that this statement by Herbert Birrell over the telephone on January 31, February 2, and February 7, 1944, was merely a continuation of an expression of his own opinion as to the merits or demerits of a lease with a small rental and a large gross rental, and that he did not intend or did not represent that his clients had said or that his clients had authorized him to say that nothing need be done until we see what the new management will be."

On March 23, 1944 there was another meeting between Mr. Lorenz and the Birrells. In the meantime, Respondent had been negotiating with other prospective tenants. Its directors on March 20, 1944, had held a meeting at which it was decided to terminate the Debtor's lease. At the March 23rd meeting Lowell Birrell informed Mr. Lorenz that Respondent wanted possession of the premises and requested that Petitioner vacate. Mr. Lorenz refused, stating that the operations were profitable and that Respondent by its delay had waived its right to terminate (R. 76, 121, 122). The Master found that the March 23rd conversation put the Petitioner on notice that Respondent intended to cancel the lease (R. 280).

About six weeks later, on May 9th, 1944, Petitioner's attorney advised Lowell Birrell by letter that it would assume the lease as modified (Exhibit N, R. 268). This was a belated attempt to accept an offer which had twice been rejected and was no longer open for acceptance. On May 31, 1944 Respondent received Petitioner's check for all rent which would have been payable under the lease as modified. This check was returned with a letter stating that its acceptance might prejudice Respondent's rights.

On May 26, 1944 Respondent leased the premises for a long term to a new tenant. Subsequently, in a telephone conversation on June 1, 1944 and in personal conferences on June 14th and 16th, 1944 between Mr. Lorenz and Lowell Birrell, there was discussion of the possibility of inducing the new tenant to surrender. This proved impracticable and on June 23, 1944, Respondent formally notified Petitioner and the Debtor of its election to terminate the lease and demanded possession of the premises (Exhibit 1, R. 235).

II.

The Petition Fails to State Facts Sufficient to Justify Granting the Writ.

However broad the power of this Court may be to review decisions of the Circuit Court of Appeals, its exercise is restricted in practice to cases where there are special and important reasons therefor (Rule XXXVIII). The jurisdiction to bring up cases by certiorari was given to secure uniformity of decision between the circuits and to bring up cases of importance which it is in the public interest to have decided by this Court, but not to give the defeated party another hearing (*Magnum Co.* v. *Coty*, 262 U. S. 159, 163; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206). Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178).

Any review in this case would be confined largely, if not entirely, to the consideration of questions of fact. Did the landlord misrepresent its intentions? Did the trustee rely thereon? Was he misled thereby? If so, did he suffer any detriment creating an estoppel? Under all the circumstances, was there unreasonable delay by Respondent in exercising its right to terminate the lease? The Master, the District Court and the Circuit Court of Appeals have concurred in findings of fact in favor of Respondent on these issues. Such findings, unless plainly without support, could not be disturbed (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178).

The general law of waiver and estoppel is well settled and needs no clarification. Nothing would be accomplished by a further review except approval or disapproval by this Court of conclusions of the lower Court with respect to its application to the facts and circumstances of this case. Such a determination would furnish little guidance in applying

the well known rules of waiver and estoppel generally. Each case involving this branch of the law would still have to be decided primarily by the solution of factual questions. The petition fails to present a situation requiring the clarification of doubtful or unsettled questions of law which are of such general importance or gravity as to merit the time and attention of this Court and justify the delay and expense incident to another appeal.

There is no merit in Petitioner's contention that a fundamental question of law of general importance is involved because the lower Court's decision might embarrass reorganization trustees who find themselves in the same position as Petitioner. There is no reason why such a trustee should be given any greater latitude than any individual tenant under a lease giving the landlord a right of cancellation. In each instance the timeliness of the exercise of the right, the existence of facts which would create an estoppel, and similar matters, would depend upon the particular circumstances and questions of fact, the determination of which would have to be left to the Trial Court.

Any disturbance of the lower Court's decision would embarrass rather rather than simplify any reorganization in which a landlord's right of termination presented a problem to the trustee. If it should be held in this case that Petitioner, by postponing action while negotiations were in progress, had lost its right to terminate, it would be a warning to any other landlord similarly situated to beware of negotiating at all. Any such landlord would probably lose no time in exercising his termination right. He might then negotiate, but would do so with hesitancy and caution. The effect would be to impede and not facilitate the reorganization.

III.

Respondent's Right to Terminate the Lease Has Not Been Lost by Delay or by Estoppel.

Respondent's right of cancellation was a continuing right, which could not be lost or impaired by the mere lapse of time. In *Model Dairy Co.* v. *Foltis-Fisher, Inc.*, 67 Fed. (2d) 704, a Receiver contended that the landlord's delay in exercising its right to terminate because of the lessee's insolvency, constituted a waiver of the right. In disapproving this contention, the Court said (p. 706):

> "The important question, and, as we have said, that on which the judge based his decision, is as to 'waiver.' That unhappy word has done much to confuse the law, in this, as in other fields. In this situation it may mean either that the right of re-entry is impliedly limited to a prompt exercise; or that it has been abandoned; or that the lessor's conduct has caused the lessee to rely upon it to his detriment. The last generally goes as an 'estoppel'. The books at times do speak of delay as though it alone were enough to end the remedy, but never, so far as we can find, except when discussing the lessee's action in reliance upon it. Catlin v. Wright, 13 Neb. 558, 14 N. W. 530, is perhaps the nearest to a holding; but even there the decision appears to have gone rather on the tenant's continued feeding of the cattle after the original breach had passed. In Kelly v. Varnes, 52 App. Div. 100, 64 N. Y. S. 1040, the tenant though in default for rent, had held over and bound himself for a second year; that was certainly a change of position. The discussion usually covers the gross situation somewhat loosely, and delay is of course a relevant factor in the picture as a whole. But on principle we cannot see why anything short of abandonment or 'estoppel' should put an end to this remedy, any more than to others. It is the tenant

> who is and continues to default; it is not apparent why he should be allowed to avoid his bargain, unless the delay has put him at some disadvantage, which prompt assertion of the remedy would not have caused. We cannot say a priori that the lessee's affairs will be less disrupted by an immediate reentry than after a delay of six months; if receiverships are of any value at all, the creditors should be in better position to protect the estate after the delay, than at the beginning."

In *Shear* v. *Healy*, 208 A. D. 269, a tenant who had the right to terminate a lease of a hotel in the event that any law should be enacted which would interfere with the traffic in liquor at the premises, waited until three years after the enactment of the Volstead law before giving notice of his election to terminate. The Court held that time was not of the essence and that the delay was not unreasonable in the absence of proof of any injury suffered by the landlord.

Considered solely from the standpoint of elapsed time, delay in exercising Respondent's right of cancellation redounded to the Petitioner's benefit. He admits that the restaurant was producing "high current operating profits" (R. 13, 21). The longer Respondent waited, and the longer the Petitioner now can retain possession, the greater the enrichment of the Debtor's estate.

The Petitioner seeks to establish claims that he suffered various injuries, not resulting from any lapse of time but from conduct of the Respondent which created an estoppel through which its right of cancellation has been forfeited.

One such claim is that the rental values of space in Times Square area, from December 6th, 1944 or even earlier, constantly increased. Therefore, it is argued, by luring the Petitioner to hope that the lease could be renewed on terms more favorable than those specified in the modifi-

cation agreement and concealing the fact that negotiations with other prospective lessees were pending, Respondent induced the Petitioner to lose his opportunity to lease other space at lower rents than those prevailing when Respondent gave oral notice of its intention to cancel on March 23, 1944 or when formal written notice was given on June 23, 1944.

That argument disregards the important fact that there is no evidence whatever that the Petitioner would under any circumstances or at any time have rented another store, or that any other space suitable for the Debtor's business was ever available. Such a move would have been extremely costly, necessarily involving a large investment of estate funds in a new venture at a new location. It is certainly reasonable to suppose the Petitioner would not have recommended and the Court would not have sanctioned any such risky investment of trust funds. The argument presupposes not only such recommendation and Court approval but a gain to the estate. The danger of loss is overlooked. The Petitioner's attorney was quite right when he informed Respondent's attorney, on December 6th, that the Debtor probably had more restaurants than it needed in that neighborhood (R. 130). The purpose of the reorganization was to rehabilitate existing restaurants, where possible, to abandon them otherwise, but not to launch new enterprises.

Another claim is that Petitioner suffered some detriment in relying on assurances by Herbert Birrell on January 28th that "there was no need to hurry." He was thus lulled into inaction and kept in ignorance of other negotiations until a new lease with another tenant had been consummated. This plea of ignorance seems somewhat naive when considered in the light of the interviews of December 6th and January 27th. On the former date, Mr. Lorenz was warned that the Petitioner's proposal for a further modification

would not be accepted; that the landlord would *canvass the market*. There was discussion as to selling the equipment to a new tenant (R. 75). The telephone message on January 27th was even more emphatic. Mr. Lorenz admits (R. 191, 192) he was then given an ultimatum—"make up your mind or we will do something else." He was then told that Respondent had canvassed the market and had other propositions which its directors were going to consider (R. 69, 70). These explicit warnings were given by Lowell Birrell, who had conducted the leasing negotiations (R. 148). Were they to be disregarded merely because Herbert Birrell, who had been handling matters in connection with payments for use and occupation (R. 148), made the casual remark that there was "no need to hurry?" Whether he made such a statement, as the Master found (14 Finding of Fact, R. 274), or did not make it, as he testified (R. 139, 141), is immaterial. The Petitioner knew, or should have known, that Respondent was negotiationg with others, that rental values were rising, and that he was risking the loss of the property to a higher bidder by prolonging his efforts to drive a better bargain.

In his petition and brief apparently Petitioner proceeds on the assumption that the Master and the Circuit Court of Appeals found that Respondent misrepresented its intentions. On the contrary, the Master found that Mr. Birrell's alleged statement that there was no need for hurry was merely the expression of his own opinion (R. 280) and that it did not mislead petitioner (Finding 13, R. 274). The Circuit Court held that the statement did not create any estoppel (R. 304). There is ~~not~~ the slightest intimation in its opinion that there had been any misrepresentation. It assumes arguendo that the statement was a misrepresentation but only to point out that, even on that assumption (R. 305), the representation was not relevant.

The Petitioner contends in effect, that Mr. Birrell's alleged statement amounted to a promise that Respondent

would keep open for the Petitioner's benefit the prior offer to renew the lease as modified by the agreement of May 1, 1941. This offer had already been twice rejected by Petitioner. Respondent had iterated and reiterated its position —nothing less than the modification agreement would be considered. If, as Petitioner contends, one of Respondent's attorneys undertook to revoke Respondent's positive and repeated rejections of the Petitioner's counter-proposal and obligate Respondent to reconsider its position and again announce its decision, meanwhile holding other negotiations in abeyance, it was high time for Petitioner to inquire about the attorney's authority. Of course, there was no such authority. The Master correctly concluded (Finding 14, R. 274) that Herbert Birrell did not state that he had any such authority.

Petitioner's complaint that he was lulled into inaction prompts an inquiry as to what he would have done if not so lulled. His own subsequent action provides the answer. On May 9, six weeks after March 23 (when he had been told that Respondent demanded possession), he writes the letter announcing his election *to assume the lease as modified*— in other words, accepting the offer of December 6th which he had at least twice rejected. The offer was no longer open. The right of assumption, if any existed, was at most the right to assume the original lease, with the $49,000. rental and all other burdens. This supposed right was not asserted until August 1, after the Master had commenced hearings (R. 123). What he sacrificed, if anything, was not any legal right, but, in the first place, a mere hope that he could get a lease on terms better than those demanded by Respondent, and in the second place, the opportunity to accept an offer which had lapsed through his rejection, though he secretly intended to accept it if he could not get more favorable terms.

Petitioner has urged an elementary principle of law that where a party has two inconsistent rights, he must elect promptly and without waiting, while the other party's position changes, to determine which choice will be the more profitable. The principle invoked has no application to the facts of this case. Respondent had one right, and one right only—the right to terminate the lease because of the lessee's bankruptcy. There was no alternative right to compel Petitioner to assume the lease. Petitioner was given ample opportunity, at least until January 28th, to assume the lease as modified. In thus cooperating with Petitioner, Respondent lost no rights. Petitioner's opportunity was lost through his own fault, in *misleading Respondent* by his attorney's representation that he would not consider any lease except one which provided for a small fixed rent with a higher percentage of sales—a representation made after Petitioner had reached his decision, which was carefully concealed from Respondent and its attorneys, that he would, if necessary, accept the terms of the lease as modified (R. 135, 198). He has no grievance because Respondent took him at his word and sought another tenant after his persistent refusal to assume the obligations of the original lease or of the modification agreement. In doing this, Respondent itself was influenced by, and acted in reliance upon, the Petitioner's conduct and statement of intention.

IV.

The Petition for Certiorari Should Be Denied.

Respectfully submitted,

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THEODORE E. LARSON,
of Counsel.

Dated April 24, 1945.